by the decision of this Court we placed in him. For these reasons, I think the application should be allowed.

Ong and **Gill JJ.** concurred.

Application allowed.

LEE KAH WAH v. CHEAH PAIK YEAN & ANOR.

[O.C.J. (Hepworth J.) February 29, 1964]

[Penang — Divorce Petition No. 13 of 1962]

Divorce—Husband's petition on grounds of cruelty and adultery—Wife's cross-petition on grounds of cruelty, adultery and desertion—Discretion to make orders on both petitions—Divorce Ordinance, 1952, s. 9(2)(c).

The petitioner left the matrimonial home on February 3, 1960. On November 29, 1962, he presented this petition for divorce on the grounds of cruelty and adultery. On February 5, 1963 the respondent filed her answer charging the petitioner with cruelty, adultery and desertion. It was held that:

(i) the petitioner had failed to prove cruelty but had succeeded in proving that the respondent committed adultery with the co-respondent on April 28, 1962.

(ii) the respondent had failed to prove cruelty and adultery but had proved desertion without just cause on the part of petitioner on February 3, 1960.

(iii) the adultery of the respondent had not terminated the desertion of the petitioner on the ground that it had not been shown that the adultery, even if known, would have affected the petitioner's conduct.

On the question as to whether the petitioner had deserted the respondent without just cause,

Held: the spouse who leaves the matrimonial home is not necessarily the deserter. The criterion for assessing whether that spouse is justified in leaving is that the conduct of the spouse remaining must exceed such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other "for better of worse", although such conduct need not amount to a matrimonial offence, such as cruelty or adultery.

The finding that the petitioner had committed the matrimonial offence of desertion constituted a discretionary bar to granting a decree to the petitioner on the ground of the subsequent adultery of the respondent by virtue of section 9(2)(c) of the Divorce Ordinance, 1952.

By virtue of the finding that the petitioner had deserted the respondent without reasonable excuse the respondent was entitled to relief, but the adultery of the respondent constituted a discretionary bar to the granting of a decree by virtue of section 9(2) of the Divorce Ordinance. On the question as to whether the discretion should be exercised in favour of the petitioner or the respondent,

Held: the Court when arriving at a decision must take into consideration:

(i) the position and interest of the child of the marriage,

(ii) the interest of the party with whom the petitioner has committed adultery with special regard to their future marriage,

(iii) the question whether, if the marriage be not dissolved, there is a prospect of reconciliation between the spouses,

(iv) the interest of the petitioner particularly as regards allowing him to remarry and live respectably, and finally,

(v) the interest of the community at large, judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

In all the circumstance of this case, the discretion of the Court should be exercised in favour of both parties.

Cases referred to:—

(1) *Buchler* v. *Buchler* [1947] 1 All E.R. 319 at p. 320.

(2) *Herod* v. *Herod* [1939] P. 11.

(3) *Blunt* v. *Blunt* [1943] A.C. 517.

(4) *O'Brien* v. *O'Brien* [1950] W.N. 330.

DIVORCE PETITION.

S. Thillaimuthu for the petitioner.

Lee Kok Liang for the respondent.

Cur. Adv. Vult.

Hepworth J.: The petitioner, Lee Kah Wah, is now a factory supervisor and resides at No. 117, Patani Road, Penang.

The respondent, Cheah Paik Yean, is a housewife and now resides at No. 14, Burmah Lane, Penang.

The petitioner and the respondent were married in the Registry of Civil Marriages, Penang, under the provisions of the Civil Marriage Ordinance, 1952, on the 25th February, 1959. Thereafter they lived and cohabited at No. 4, Tanjong Tokong Road, Penang, and then at No. 27-P, Lorong Kampong Melayu, Penang.

There is one child of the said marriage now living namely Lee Weng Thong, a male, who was born on the 11th February, 1960.

The co-respondent, Louis Lim's last known address is care of the Manager's House, Kepong Dredging Co. Ltd., Jinjang, Selangor, but his present whereabouts is not known. He was served by advertisement and did not enter an appearance.

The petitioner charges the respondent with cruelty and adultery. In her answer the respondent charges the petitioner with cruelty, adultery and desertion. On these grounds the petitioner and the respondent respectively pray for the dissolution of the marriage.

The petitioner left the matrimonial home, at that time at No. 27-P, Lorong Kampong Melayu, on the 3rd February, 1960, and it will be seen from this that the marriage lasted less than one year.

The petitioner in support of his charge of cruelty pleaded 17 different acts on the part of the respondent which he alleged amounted to cruelty, fourteen of them between the 13th March, 1959, and the 8th August, 1959, and three between the 26th December, 1959, and the 3rd February, 1960.

I do not propose to refer to these individual incidents in detail. The legal conception of cruelty which is not defined by statute is generally described as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, the Court must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character and social status. (*Halsbury's* Laws of England, 3rd Edition, Volume 12, page 269). The incidents with which we are concerned must be looked at as a whole and not one by one. It is necessary to consider therefore whether the petitioner's story can be accepted at its face value or whether it is exaggerated and whether or not the petitioner's story is to be accepted at its face value or it is exaggerated did the acts complained of constitute conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger?

When considering this question it is necessary to remember that the burden of proof of a matrimonial offence is upon the person alleging it and the standard of proof is similar to that in a criminal case, that is to say it is necessary for the case to be proved beyond reasonable doubt.

Of the 14 incidents which were alleged to have taken place between the 13th March, 1959. and the 8th August, 1959, in only 3 of them, those which took place on the 13th March, 1959, the 30th June, 1959, and the 1st August, 1959, were witnesses called to support the petitioner's story. Of these the evidence of Wong Khay Koe (P.W.5) who gave evidence as to the incidents on the 13th March, 1959, and on the 30th June, 1959, was not impressive as his recollection did not appear to be very clear. The respondent called 2 domestic servants who gave evidence in respect of 6 of such incidents, evidence which did not confirm the petitioner's version of what had taken place. It must be said however that the 2 servants Liao Ah Pheng (D.W.2) and Puah Pua Bok (D.W.3) were very biassed in favour of the respondent and freely admitted that they did not like the petitioner.

As regards the incident on the 26th December, 1959, there was no corroboration of the petitioner's story. The incidents on the 6th January, 1960, and the 2nd February, 1960, were corroborated by Cheah Saw Kian (P.W.6), but it is to be noted that P.W.6. stated that the respondent said the reason for the quarrel on the 2nd February, 1960, was that the petitioner had annoyed her and that the respondent had complained to her that the petitioner ill-treated her. It is clear moreover that the evidence led on behalf of the petitioner of what took place on the night of the 2nd February, 1960, particularly that of the petitioner himself, was very exaggerated. As Dr. Morgan (D.W.5) put it, "if the respondent chased a person on the 2nd February, 1960, it would have to be a very leisurely chase".

Between the 8th August, 1959, and the 26th December, 1959, a period of 4½ months, no episodes or incidents are alleged by the petitioner and after that there were only 3 episodes namely on the 26th December, 1959, 6th January, 1960, and that of the night of the 2nd - 3rd February, 1960, after which latter incident the petitioner left the matrimonial home. It may be that the fact that there were only 3 incidents which the petitioner considered to be worthy of note between the 8th August, 1959, (the incident referred to in paragraph 23 of the petition as taking place on the 26th August, 1959, apparently took place 2 months earlier) and the 2nd February, 1960, may be the result of the signing of the agreement by the petitioner and the respondent on the 21st August, 1959. This agreement appears in the agreed bundle of documents at page 3. This agreement contains paragraphs which in general confirm the allegations made by the petitioner as to the conduct of the respondent prior to the date of that agreement. The respondent alleged that she had signed this agreement under duress. Exactly what she meant by duress was not entirely clear, but in my opinion when she signed that agreement she knew what it contained and was in fact admitting that there was at least some truth in the statements contained therein.

I think it is important to remember that the respondent was in a pregnant condition from the beginning of May, 1959, and symptoms of pregnancy, such as morning sickness, nausea and vomiting, could be expected from about the middle of June onwards. I accept without question Dr. Por Peng Teik's (P.W.9's) general statements with regard to women in pregnancy. But it is a matter of common knowledge that during pregnancy general discomforts together with nausea and swelling of the limbs, both of which were present in the case of the respondent, are at least calculated to become burdensome to the individual at times. It seems to me to follow that in a case of a person like the respondent who, from observation in the witness box over

a number of days, is highly strung, this condition is likely to make her reactions to any set of circumstances more extreme than usual. It is noteworthy that only two of the incidents alleged took place prior to the 30th June, 1959.

That the petitioner was not altogether the long suffering, sympathetic and considerate husband he tried to make himself out to be is I think made abundantly clear by his leaving the matrimonial home on the 3rd February, 1960. This was the date upon which Dr. Morgan had told the respondent the baby would be born and I have not the slightest doubt that she told the petitioner. I agree with Dr. Morgan that the petitioner's place was with his wife at that time and that no matter what provocation he had received he should not have walked out on her. If he could do this, it may well be that lack of consideration on his part materially contributed to the quarrels which took place.

The hearing of this trial lasted for 13 days and it is, I think, pre-eminently a case where the seeing and the hearing of the witnesses is all important. The impression that I am left with when considering the evidence led on behalf of the petitioner on the ground of cruelty is that the petitioner's story is exaggerated. Any lingering doubt in my mind as to this was dispelled by the evidence of Dr. Morgan when he described the physical condition of the respondent at the time of the last incident on the night of the 2nd - 3rd February, 1960, from which it was abundantly clear that the respondent was physically incapable of chasing a fit, agile and active young man like the petitioner.

The petitioner was a ju-jitsu enthusiast and used to go to a Ju-Jitsu Institute to train once a week. It is, therefore, a reasonable inference that he was a fit man well able to take care of himself. In my opinion the actions of the respondent did not cause danger to the petitioner's life or limb or give him a reasonable apprehension that they would do. If in fact she did say as was alleged by the petitioner that she would render him impotent or blind him then I think these statements should have been dismissed as those of a highly-strung woman who had lost her temper and was making threats blindly without any intention of carrying them out. She was clearly not the sort of women to do any such thing.

The petitioner's principal contention was that the treatment that he had received from the respondent affected his mental health to such an extent that he was unable to perform his duties at the Penang Port Commission and was obliged to resign as a result. It should be noted, however, that he ceased to work for the Penang Port Commission on the 22nd July, 1959, prior to which only six of the incidents alleged had taken place. He then obtained employment as a master at the Methodist Boys' School with effect from the 23rd July, 1959. I fail to see how if he was unable properly to carry out his duties at the Penang Port Commission owing to mental strain and insufficient rest he was in any way better able to carry out satisfactorily his duties as a school master. Yet he remained as a school master at the Methodist Boys' School for 2½ years until the 15th January, 1962, that is to say for one year and eleven and a half months after he had left the respondent. In these circumstances the petitioner's statement that "I left my teacher's job because I found the affair between me and respondent has made me nervous and unable to carry on my work, even after I left her" is, to put the mildest possible interpretation on it, misleading. If, however, there was any doubt as to his mental health, and no medical evidence whatever was produced at any time as to his physical or metal well-being or otherwise, it was set at rest by the particular fact which led to the final quarrel on the 2nd February, 1960. That quarrel all arose out of the fact that after returning from the cinema the petitioner commenced to write a letter to the University of Malaya with a view to getting himself enrolled on a Post Graduate Honours Degree Course. It does not seem to me in any way probable that anyone suffering mental and physical strain sufficient to endanger mental health or apprehension of such danger is going to consider for a second taking a Post Graduate Honours Degree Course.

Taking all in all therefore and bearing in mind that the burden of proof of a matrimonial offence is not just upon the balance of probabilities but is the proving of the matrimonial offence beyond reasonable doubt I am of the opinion that in so far as the ground of cruelty is concerned the petitioner has failed to discharge that onus.

The question therefore whether the agreement of the 21st August, 1959, constituted condonation of any acts of cruelty prior thereto and, if so, whether any subsequent acts of cruelty had revived the acts which had been condoned, does not arise.

The petitioner's second ground is that the respondent committed adultery with the co-respondent, Louis Lim, at 14, Burmah Lane, Penang, in 1962 and also at the Hollywood Hotel, Chamberlain Road, Ipoh, in April and July, 1962.

Sometime at the end of 1961 or the beginning of 1962 the respondent moved to 14, Burmah Lane, Penang. While there she took in a boarder, the co-respondent, Louis Lim, a young man at that time aged 20. She said that he occupied the back room while she herself, her servant and her child occupied the front room.

The petitioner had a close friend, Mr. Kam Hock Hoe (P.W.8), who lives at 217, Macalister Road, Penang, and is the Principal of the International Ju-Jitsu Institute, Penang. P.W.8 has a branch of his International Ju-Jitsu Institute at Ipoh which necessitated his attendance in Ipoh from time to time.

When in Ipoh it was P.W.8's custom to visit the Hollywood Hotel in his leisure time after his ju-jitsu classes. Sometime in April, 1962, he went to the Hollywood Hotel and saw the respondent with another man whom he later found out to be the Louis Lim now cited as the co-respondent.

He said that on this occasion when the respondent and Louis Lim went upstairs at the hotel he saw them enter room 51 and said that after waiting for 10 or 15 minutes along the passage the lights in the room went out.

He then went downstairs and examined the register (P.2) and saw the names of the respondent and Louis Lim together with their identity card numbers, the respondent's room number being stated at 52 and Louis Lim's room number as 51. Also in the Register appears the name of one Woh Chai Yong (Wong Choy Yong, D.W.4), who was at that time the respondent's servant, who was also stated to be an occupant of room 52.

As regards this visit it is clear that room 52 was occupied not only by the respondent and D.W.4 but also by the respondent's son.

P.W.8 stated that then and there he initialled the top of the page of the register (P.2) in which are the relevant entries and this page is in fact so initialled.

P.W.8 stated that at about 1.30 p.m. the following day the respondent and Louis Lim left in an Opel car No. AB. 7856 together with the servant and the small boy. He stated that Louis Lim was driving the car and the respondent was in the front seat beside him and at the back the servant and the small boy. P.W.8 went on to say that on the 28th April, 1962, he was also in Ipoh and again saw the respondent and Louis Lim at the Hollywood Hotel. On looking at the register (P.2) he found that Mr. and Mrs. Louis Lim were registered as occupying room 90 and the identity card numbers were the same as before, one of them being the identity card number of the respondent. Again he initialled the relevant pages of P.2.

Again in July 1962, P.W.8 stated that he was in Ipoh and went to the Hollywood Hotel and again saw the respondent and Louis Lim. He found that Mr. and Mrs. Louis Lim were registered as staying in room 90 but stated that the respondent's identity card number did not appear. The Manager of the Hotel had been subpoenaed to produce this register as well as P.2, but a representative of the hotel stated in evidence that this register had been mislaid and was not available.

In any event P.W.8 stated that he went to the hotel in the afternoons until the 29th April, 1962, when he stated that Louis Lim and the respondent left the hotel.

He stated that when he first told the petitioner after the first occasion that he had seen the respondent and Louis Lim at the Hollywood Hotel the petitioner had not believed him. However, about 3 months later he and the petitioner went to the Hollywood Hotel to see the register and saw the entries of the July visit. They had photostat copies taken of the entries in April, but they did not have photostat copies taken of the entries in the register which was subsequently missing and the reason given was that in the July entry the respondent's identity card number was not mentioned.

The respondent admitted being in the hotel on the 22nd April, 1962, having gone to Ipoh with Louis Lim, her servant and her son for the purpose of buying Bougainvillea plants from the Poh Gardens, Ipoh. She also admitted that one of the identity card numbers was hers. She stated that she and her servant and the boy stayed in room 52 and that Louis Lim and his cousin stayed in room 51. The respondent denied being in Ipoh on the 28th April, 1962, and in July, 1962. She stated that on both these occasions she was at home in Penang, but no evidence was led to substantiate this apart from her own statement.

Evidence was also led to show that the respondent together with her child were seen from time to time with Louis Lim in Penang driving down Burmah Road in a car, walking along the road outside the Chartered Bank and having food at a restaurant.

It was conceded on behalf of the petitioner that the mere fact that the respondent had taken in a boarder in her house No. 14, Burmah Lane was not evidence of adultery, but they contended that this fact together with the fact that the co-respondent and the respondent had been seen together on a number of occasions in Penang and the three visits to Ipoh to stay at the Hollywood Hotel were facts on which it could be inferred that adultery had taken place.

Had the evidence on this ground consisted solely of the fact that the co-respondent lived at 14, Burmah Lane as the boarder of the respondent and the trip to Ipoh on the 22nd April, 1962, I do not think it would have constituted proof of adultery of the standard required, even though the evidence of D.W.4, who was the respondent's servant at the time, was unsatisfactory, and the existence of the cousin, who was not called as a witness, was open to question. In addition the

fact that the petitioner did nothing for 3 months, after being informed by P.W.8 what had taken place in Ipoh in April, 1962, and the absence of the July register, were unsatisfactory points. But I did not see any reason to doubt the word of P.W.8. Admittedly he was a very close friend of the petitioner and he may have been mistaken about who was occupying rooms 51 and 52 in the Hollywood Hotel on the 22nd April, 1962. But he did not strike me as being a witness who was telling a wholly fabricated story about the alleged visits of the respondent and the co-respondent to the Hollywood Hotel on the 28th April, 1962, and in July, 1962, and with regard to his evidence as to the presence of the respondent and the co-respondent at the Hollywood Hotel on the 28th April, 1962, it is corroborated by the fact that against the names of Mr. and Mrs. Louis Lim, the occupants of room 90, appears the identity card number of the respondent.

In my opinion therefore there is evidence to show that the respondent committed adultery with the co-respondent at the Hollywood Hotel on the 28th April, 1962, and I so find.

As regards the respondent's answer, the evidence adduced by the respondent as to the petitioner's adultery and the petitioner's cruelty falls far short of the standard required and accordingly I find that the petitioner was not guilty either of adultery or cruelty.

The date upon which the petitioner left the matrimonial home was the 3rd February, 1960. The petition was presented on the 29th November, 1962. The answer was filed on the 5th February, 1963. The petitioner concedes that as regards the desertion pleaded by the respondent the operative period of three years runs for the three years immediately preceding the 5th February, 1963.

It is conceded on behalf of the petitioner that, if, as I have found, the respondent was not guilty of cruelty, the petitioner in leaving the matrimonial home on the 3rd February, 1960, was guilty of desertion, unless he can establish that the conduct of the respondent, although falling short of the matrimonial offence of cruelty, excuses the desertion (see *Rayden* on Divorce, 8th Edition, page 185). It is urged on behalf of the petitioner however that even if the conduct of the respondent falls short of that required for the proof of the matrimonial offence of cruelty, her conduct was sufficient to justify his leaving the matrimonial home, such conduct amounting to just cause.

This is a question of no little difficulty and I do not think that I can do better than quote an extract from the judgment of the learned Master of the Rolls, Lord Greene, in *Buchler* v. *Buchler* [1] which reads as follows:—

"Where the desertion alleged is constructive desertion, it is important to see that the circumstances necessary to constitute that offence are present before the final step of dissolving the marriage is taken by the Court. It would, I venture to think, be unfortunate if under guise of alleged constructive desertion a new cause for divorce should imperceptibly creep into our law: see the language of Lord Merriman, P., in *Leng* v. *Leng* ([1946] 2 All E.R. 590, at p. 593). Incompatibility of temperament and unhappiness in the marital relationship which is not caused by cruelty are not by themselves grounds of divorce, nor by themselves do they entitle the spouse affected to leave the matrimonial home and then to claim that the other spouse, even if he or she is alone to blame for the ill-success of the marriage, has been guilty of the grave matrimonial offence of desertion. It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion. The practical difference between the two cases lies in the difference in the circumstances which will constitute such proof. In actual desertion the spouse charged must be shown to have abandoned the matrimonial consortium in fact and to have done so with the intention of deserting. In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to 'driving the other spouse away': per Bucknill J. in *Boyd* v. *Boyd*. ([1938] 4 All E.R. 181 at p. 183); from the matrimonial home and to have done so with the intention of bringing the matrimonial consortium to an end. In each case the intention may, of course, be inferred if the circumstances are such as to justify the inference. In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one. In the case of constructive desertion where there is no such significant act as a departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is expulsion in fact not proved, but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him, but such a wish, unless accompanied by conduct which the Court can properly regard as equivalent to expulsion in fact, can have no effect whatever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred since no one can be heard to say that he did not intend the natural and probable consequences of his acts: *Sickert* v. *Sickert* ([1899] P. 278). The crucial matter for consideration therefore, is the nature of the conduct relied on as equivalent to an expulsion of the complaining spouse.

It must, I think, be accepted that the acts sufficient to satisfy this test must be of a serious and convincing nature. Counsel for the husband submitted that nothing short of a matrimonial offence such as cruelty or adultery would suffice, and he pointed out that, even in the case of adultery, some more flagrant conduct beyond the mere commission of adultery had always been present in the reported cases, but he eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him, but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home".

And again at page 322:—

"But, as I have already said, in cases of alleged constructive desertion it is essential to examine the actual

facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home".

In the same case at page 326 Lord Justice Asquith stated:—

"In the first place, it is common ground and a commonplace that the spouse who leaves the matrimonial roof is not necessarily the deserter. Constructively the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But, thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better or worse.' The ordinary wear and tear of conjugal life does not in itself suffice....

It is difficult to deduce from the decided cases any principle of law by reference to which it can be determined in every case on which side of this line the case falls. To say that the petitioner must establish conduct by the respondent which has made it 'practically impossible for the parties to live properly together', or which 'drove the petitioner out,' is to propound a criterion too vague to be very helpful. It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no man's land where the issue is one of fact."

I have already found that the conduct of the respondent did not amount to the matrimonial offence of cruelty and it is necessary therefore to decide whether the conduct of the respondent exceeded in gravity "such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better or worse' ". To decide this it is necessary to look at the facts.

The petitioner left the matrimonial home on the 3rd February, 1960. Between the 8th August, 1959, and the 3rd February, 1960, there were only three matters of complaint pleaded and these took place on the 26th December, 1959, 6th January, 1960, and the final episode on the night of the 2nd - 3rd February, 1960. The first point which has to be taken into consideration in my opinion is that between the 8th August, 1959, and the 26th December, 1959, a lapse of 4½ months, no incidents took place. And the second point of importance is that even accepting the petitioner's own version of what took place on the 26th December, 1959, and the 6th January, 1960, at their face value neither of these two incidents could be described as other than relatively trivial. The final incident on the night of the 2nd - 3rd February, 1960, was of a more serious nature than those of the other two incidents. But for the reasons I have already stated in my opinion the petitioner's version of this incident is exaggerated. Taking the whole of the facts of the case into consideration I am of the opinion that vexatious and trying though the respondent's behaviour may have been it was not sufficiently grave to justify the petitioner leaving the matrimonial home on the 3rd February, 1960, and did not constitute conduct amounting to just cause. I find therefore that in leaving the matrimonial home on the 3rd February, 1960, the petitioner was guilty of desertion.

I have found that the petitioner deserted the respondent on the 3rd February, 1960, and that the respondent committed adultery on the 28th April, 1962. *Prima facie* adultery would terminate the desertion because it gives just cause, but it was held in *Herod* v. *Herod* [2] that it must be shown that the adultery, even if known, would have affected his or her conduct. The petitioner did know of the respondent's adultery because P.W.8 told him about it, but I think that all the evidence in this case points to the fact that the respondent's adultery over two years after the petitioner left the matrimonial home has not had the slightest effect on the petitioner's conduct.

The petitioner is asking the Court to exercise its discretion in his favour in respect of adultery committed by him subsequent to the 3rd February, 1960. He states that he wishes to marry the lady with whom the adultery has been committed. There is no evidence that this was at any time known to the respondent and could therefore in any way have influenced or otherwise affected her actions subsequent to the 3rd February, 1960.

The finding that the petitioner has committed the matrimonial offence of desertion constitutes a discretionary bar to granting a decree to the petitioner on the ground of the subsequent adultery of the respondent by virtue of paragraph (c) of the proviso to sub-section (2) of section 9 of the Divorce Ordinance, 1952.

It has however at no time been suggested, nor has it been pleaded, that the conduct of the petitioner conduced to the respondent's adultery.

In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground of adultery, cruelty or desertion without reasonable excuse of the petitioner, the Court may in such suit give the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking relief (section 11 of the Divorce Ordinance, 1952). By virtue of the finding that the petitioner has deserted the respondent without reasonable excuse the respondent is entitled to relief, but the adultery of the respondent constitutes a discretionary bar to the granting of a decree by virtue of the proviso to sub-section (2) of section 9 of the Divorce Ordinance, 1952.

It is necessary therefore to consider in whose favour discretion should be exercised. In the House of Lords case of *Blunt* v. *Blunt* [3] the learned Lord Chancellor, Viscount Simon, stated at page 531:—

"Speaking, however, more, generally it appears to me that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the Court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only. There is no reason in principle why, where both sides are in mercy, if the Judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them."

The Court when arriving at a decision must take into consideration (1) the position and interest of the child of the marriage, (2) the interest of the party with whom the petitioner has committed adultery with special regard to their future marriage, (3) the question whether, if the marriage be not dissolved, there is a prospect of reconciliation between the spouses, (4) the interest of the petitioner particularly as regards allowing him to remarry and live respectably, and finally (5) the interest of the community at large, judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

I am quite satisfied that this is a marriage which has utterly broken down and there is no prospect whatever of reconciliation between the spouses. The petitioner has stated that he wishes to marry the party with whom he has committed adultery.

The facts of this case are very similar to those in the case of *O'Brien* v. *O'Brien.*[4] In that case the Court of Appeal held that the case fell within the words of Lord Simon in *Blunt* v. *Blunt*, *supra*, and that the right order was for the Court, in the exercise of its discretion, to pronounce a decree *nisi* on the ground of adultery and on the cross-petition on the ground of desertion.

In all the circumstances of this case I have reached the conclusion that both parties should be granted a decree.

The discretion of the Court will be exercised in favour of the petitioner and the petitioner will be granted a decree *nisi* to be made absolute in three months, on the ground of the respondent's adultery with the co-respondent.

The respondent will be granted a decree *nisi*, to be made absolute in three months, on the ground that the petitioner has deserted the respondent without cause for a period of three years immediately preceding the presentation of the answer.

I will hear argument as to costs.

Order accordingly.

Solicitors: *S. Thillaimuthu; Lee Kok Liang.*

LOO PENG KEAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Hepworth J. March 6, 1964]
[Penang — Criminal Appeal No. 1 of 1964]

Penal Code, s. 224—Police officer arresting person on suspicion of being smuggler—Escaping from custody—Whether custody lawful—Conviction not sustainable unless detention escaped from is lawful.

A police boat on patrol duty in Penang Harbour stopped a speed boat coming from the direction of the Island and going towards Prai. In the boat were two persons, one of whom was the appellant, neither of whom had their identity cards on them. On examination of the speed boat it was found to be empty. Nothing was found on either of the occupants. Suspecting the appellant of being a smuggler the police detained the appellant, from which detention he escaped. He was consequently charged and convicted under section 224 of the Penal Code. On appeal,

Held: there were no reasonable grounds for suspicion that the appellant was guilty of an offence under the Customs Ordinance, 1952 or any regulation made under it. There was no ground for taking the appellant into custody and the custody was consequently unlawful. There was therefore no lawful detention within the meaning of section 224 of the Penal Code.

CRIMINAL APPEAL.

Eugene Khoo Oon-Jin for the appellant.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The appellant was charged in the Magistrate's Court, Penang, as follows:—

"That he on the 24th day of October, 1963, at about 1.50 a.m. at the Church Street Pier, Penang, intentionally escaped from the custody of one P.O. 149 Ahmad bin Senawi, in whose custody he was lawfully detained for the offence of behaving in a suspicious manner in a speed boat and that he has thereby committed an offence punishable under section 224 of the Penal Code".

The appellant was convicted of the said charge and bound over for 6 months in the sum of $200 in one surety under section 290 of the Criminal Procedure Code. From this conviction and order of binding over the appellant appealed.

The appellant's principal ground of appeal was that the charge did not disclose an offence known to law. Whilst admitting that the appellant was taken into custody and that he escaped from that custody it was contended on behalf of the appellant that the taking into custody was unlawful. It was submitted that the fact that the police officer (P.W.1) had thought that the appellant was behaving in a suspicious manner did not by itself entitle him to take the appellant into custody. It was submitted by the appellant that the prosecution had failed to adduce any evidence that he had committed any offence against either the Penal Code or the